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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

HERMAN ROBERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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INDEX.

Page

Opinions below 2

Grounds of jurisdiction 2

Questions presented for review..... 2

Statutes involved 3

Statement of the case..... 4

Reasons for allowance of writ..... 7

The decision of the Court of Appeals for the Fifth Circuit relating to the right of a district judge to preside over the trial of a criminal case where he has prior knowledge of or a prior interest in the facts surrounding the said case raises an important federal question which has not been, but should be, decided by this court 7

The decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Court of Appeals for the Eighth Circuit, the Court of Appeals for the Fourth Circuit, and the Court of Appeals for the District of Columbia, relating to the right of an accused to cross-examine a Government witness as to his past acts of misconduct, when such acts of misconduct are material evidence..... 11

The decision of the Court of Appeals for the Fifth Circuit relating to the prejudicial effect of remarks of a United States attorney raises an important federal question which has never been decided by this Court..... 14

Conclusion 17

Certificate 18

Appendix "A"—Opinion 19

Appendix "B"—Judgment 29

Cases Cited.

Baugh v. State, 215 Ala. 619, 112 So. 157 16
Birmingham Ry. Light & Power Co. v. Selhorst, 165 Ala. 475, 51 So. 568 14
Cockrell v. State, 32 Ala. App. 618, 29 So. 2d 152 16
Dist. of Col. v. Chessin (D. C.), 61 F. 2d 523 12
Ex Parte Marshall, 207 Ala. 566, 93 So. 471, 25 A. L. R. 338 16
Fay v. United States, 22 F. 2d 740 16
Gordon v. United States, 344 U. S. 414, 73 S. Ct. 369.. 12
Jencks v. U. S., 353 U. S. 657, 77 S. Ct. 1007 9
Moomaw v. State, 23 Ala. App. 125, 121 So. 904 12
Moore v. State, 26 Ala. App. 607, 164 So. 761 15
Phillips Petroleum Corp. v. Williams, 159 Fed. 2d 1011 9
Pittman v. U. S. (8th Cir.), 42 F. 2d 793 12
Pullman Co. v. Hall (4th C.), 55 F. 2d 139 11
Roberson v. U. S., 237 Fed. 2d 536 .....4, 15
Smith v. United States, 238 F. 2d 925, 931 10
Tla-koo-yel-lee v. U. S., 167 U. S. 274, 17 S. Ct. 855..11, 13
U. S. v. Maher (D. C. Me. 1950), 88 F. Supp. 1007 8-9
U. S. v. Vasilick (3rd C. 1947), 160 F. 2d 631 8
Weisflog v. U. S. (8th C.), 291 F. 2d 339 11

Statutes Cited.

28 U. S. C., Sec. 1254 (1) 2
28 U. S. C., Sec. 455 .....3, 5, 8, 9
28 U. S. C., Sec. 507 (a) (1) 3
18 U. S. C., Sec. 2313 4

Rules Cited.

Fed. Rules of Criminal Procedure: 39 (a) 3, 9

IN THE

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HERMAN ROBERSON,
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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on November 22, 1957, being Case No. 16,626. Subsequent to this judgment of the United States Court of Appeals for the Fifth Circuit, Petitioner filed a Petition for Rehearing in said Court, together with a Motion to Supplement the Record, which Petition and Motion were denied by order dated January 25, 1958 (R. 403).

OPINIONS BELOW.

The judgment of the United States District Court for the Middle District of Alabama is unreported (R. 336-337).

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 249 F. 2d 737. A copy of said opinion is attached to this petition as Appendix "A". A copy of the judgment of the Court of Appeals is attached hereto as Appendix "B".

GROUNDS OF JURISDICTION.

The judgment sought to be reviewed was made and entered on November 22, 1957 (R. 373). A Petition for Rehearing and Motion to Supplement the Record were filed on January 10, 1958, and the Court entered an order denying the same on January 25, 1958 (R. 375-400, 403). The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Should an accused be denied the right to have inspection by a Court of Appeals of the file used by the United States District Judge, while such judge was a United States Attorney, in prosecuting the chief government witness on this trial who was a member of the same automobile "theft ring" of which accused is allegedly a member, so that the said Court of Appeals may review the ruling of the District Judge in refusing to disqualify himself?

2. Should a United States District Judge, sitting in a criminal case, be disqualified from presiding over the trial of an accused who is allegedly a member of the same automobile theft ring as the chief government witness, who was previously prosecuted by the said judge in another

district where he was United States Attorney, when such previous prosecution has given the judge a prior knowledge of or interest in the facts of the case before him?

3. Where there is strong evidence that a government witness was a participant in the crime charged to the accused, should the accused be denied the right to cross-examine that witness as to his past acts of misconduct which tend to refute his testimony and that of other witnesses as to material facts in the case?

4. Should a mistrial be declared when an accused is asked by the United States Attorney whether or not he has been convicted of "distilling"?

STATUTES INVOLVED.

The following statutes are involved:

28 U. S. C., Sec. 455:

> Interest of justice or judge—Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U. S. C., Sec. 507 (a) (1):

> Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:
>
> (1) Prosecute for all offenses against the United States;

Fed. Rules of Criminal Procedure: 39 (a):

> Supervision in Appellate Court. The supervision and control of the proceedings on appeal shall be in the

appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

18 U. S. C., Sec. 2313:

Sale or receipt of stolen vehicles: Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving, as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE.

Petitioner was charged in five counts with violation of 18 U. S. C., Sec. 2313, relating to buying and selling stolen automobiles, knowing the same to have been stolen. He was convicted on three counts and sentenced to four years imprisonment. This was petitioner's second trial under the same indictment, his first conviction on four counts and sentence to four years imprisonment having been reversed by the United States Court of Appeals for the Fifth Circuit in **Roberson v. U. S.**, 237 Fed. 2d 536.

Shortly after Petitioner was convicted and sentenced, he learned for the first time that the trial judge who presided over the trial and pronounced sentence, had served as United States Attorney for the Northern District of Alabama at the time the star Government witness, Hollis Bryant (R. 49-98), had been convicted of interstate transportation of stolen automobiles. Bryant was the man who

delivered to Montgomery, Alabama, all of the automobiles involved in Petitioner's trial. Petitioner promptly moved for a new trial on the ground that the District Judge should have recused himself under 28 U. S. C., Sec. 455 because of prior knowledge of or interest in the facts surrounding the case before him (R. 338). The Record does not show any facts concerning the District Judge's prior knowledge of or interest in the case until the averments of Petitioner's motion for a new trial, such facts being unknown to Petitioner until after the trial. The District Judge overruled Petitioner's motion for new trial, and Petitioner made timely appeal to the United States Court of Appeals for the Fifth Circuit.

In the Court of Appeals on Petition for Rehearing, Petitioner entered a motion to supplement the Record in the case by ordering the United States Attorney for the Northern District of Alabama to turn over to the Clerk of the United States District Court for the Northern District of Alabama, for transmittal to the Court of Appeals, the file used by the trial judge in the prosecution of Hollis Bryant. The purpose of this motion was to allow the Court of Appeals to review the ruling of the trial judge on his disqualification. Alternatively, Petitioner prayed that the Court of Appeals remand the case to the Middle District of Alabama with instructions to the District Judge to supplement the Record so that the Court of Appeals might review his decision that he did not have such a prior knowledge or interest in the case as to require that he recuse himself. The Court of Appeals denied Petitioner's motion by order dated January 25, 1958 (R. 403).

Other facts material to the consideration of the questions presented are set out below. These facts are material not only for the errors apparent therein, but also in showing that the trial judge should have disqualified himself.

During the course of the trial Petitioner was asked by the United States Attorney on cross-examination: "Now in 1941, on the 28th day of April, were you convicted of distilling and did you receive a sentence of three years?" (R. 225). Petitioner's objection to this question was sustained but the Court refused to declare a mistrial despite the highly prejudicial question by the United States Attorney.

In rebuttal, the United States Attorney called Jack Hamel as a witness (R. 228-252). It had been Petitioner's contention throughout the trial that the automobiles were purchased and later sold by someone other than himself (R. 80, 83, 104, 131-132, 134, 146, 149-150, 182, 192, 194, 306, 307, 309, 313-314). Petitioner contended that Jack Hamel and his partner, Hayden McBrayer, had been the purchasers and sellers of several of the automobiles, one of them being a car for the receipt of which Petitioner was convicted. Jack Hamel attempted to rebut Petitioner's contention by testifying that the transactions in question had been conducted by Hamel and McBrayer on paper only because McBrayer and Hamel had a good credit rating and Petitioner could not obtain credit in his own name (R. 242). In an effort to show that Hamel's explanation was untrue, Petitioner asked Hamel on cross-examination whether or not McBrayer had run away from Montgomery with financed automobiles (R. 243). Hamel said that McBrayer had not.

The government witness who followed Jack Hamel was Hayden McBrayer (R. 252-264). On cross-examination, the following occurred (R. 258-259):

> "Q. Did you leave Montgomery with the floor planned automobiles that Mr. Barnett had floor plans on?
>
> The Court: I am not going to allow this witness to be intimidated, because he is not on trial, whether or not he had absconded had nothing to do with the guilt or innocence of Herman Roberson.

Mr. Fuller: Your Honor, we think on our impeachment question, that we have witnesses——

The Court: You want to bring in immaterial matters, not pertinent to this case.

Mr. Fuller: We think, Your Honor, that if this man left here with automobiles that were floor-planned, that is an action that is a material matter. We think that we can show that.

The Court: Just a minute, I told you I would not allow you to go into that, it is not pertinent in my judgment. I don't want to hear any more examination on it during the course of this trial for the Government or the defendant.

Mr. Fuller: I am sorry, Your Honor."

It is noteworthy that Petitioner's counsel was stopped here by the judge without benefit of objection from the United States Attorney.

REASONS FOR ALLOWANCE OF WRIT.

The Decision of the Court of Appeals for the Fifth Circuit Relating to the Right of a District Judge to Preside Over the Trial of a Criminal Case Where He Has Prior Knowledge of or a Prior Interest in the Facts Surrounding the Said Case Raises an Important Federal Question Which Has Not Been, But Should Be, Decided by This Court.

This case raises fundamental questions of great importance as to the right of any citizen accused of a criminal act to be tried before a judge who has no prior knowledge of the facts surrounding the case which might give him a preconceived opinion as to the guilt of the accused. The Record shows that Hollis Bryant (R. 49-98) was the person who delivered all of the automobiles connected with the trial of Petitioner to Montgomery, Alabama, where Peti-

tioner lived. Previous to the trial of Petitioner, Bryant had been convicted in the Northern District of Alabama of an offense involving the interstate transportation of stolen automobiles. The United States Attorney at the time of Bryant's conviction was Hon. Frank M. Johnson, the present District Judge for the Middle District of Alabama, who presided at the trial of Petitioner.

As soon as Petitioner became aware of Judge Johnson's connection with the Bryant prosecution he objected to Judge Johnson's failure to recuse himself (R. 340). In denying Petitioner's motion for new trial, Judge Johnson took judicial notice of the contents of the file of the United States Attorney for the Northern District of Alabama. Petitioner is entitled to have review of the trial judge's ruling as to those contents in a court of appellate jurisdiction.

The government argued below, at page 2 of its brief on Petition for Rehearing, that the file of the United States Attorney for the Northern District of Alabama if made available to Petitioner would disclose its "confidential informants on a large auto theft **ring**." (Emphasis supplied.) In fact, however, Petitioner asked only that the Court of Appeals inspect the file. This could in no way expose the government's "informants." Moreover, the government's contention reveals the scope of the alleged theft ring and a logical conclusion from its contention is that the prosecution of Petitioner came about as a result of the investigation of the theft ring by Judge Johnson's office while he was United States Attorney. Petitioner sought to show that in effect Judge Johnson was one of the attorneys who prepared the case against him. Where a United States Attorney prepares a case against a person and then presides over the trial of that person the spirit and letter of 28 U. S. C., Sec. 455, are violated. **U. S. v. Vasilick** (3rd C. 1947), 160 F. 2d 631; **U. S. v. Maher** (D. C.

Me. 1950), 88 F. Supp. 1007. The effect of Section 455 cannot be avoided by the fact that the preparation occurred in one federal district and the trial in another. Yet the trial judge dismissed this ground of Petitioner's motion for new trial as "frivolous" (R. 346).

The Court of Appeals showed more interest in Petitioner's contention. Judge Jones, speaking for the Court, stated that ". . . if the cars, involved in the trial over which the former United States Attorney presided as District Judge were the same as those involved in the investigation made and prosecution conducted by him as counsel for the Government, there might have been presented a situation under which the judge should have disqualified himself" (R. 367). However, the Court of Appeals apparently was reluctant to give aid to Petitioner in his plight of discovering this ground of disqualification too late to bring to the Court any record on which it could have reviewed Judge Johnson's ruling. Petitioner moved the Court of Appeals to supplement the Record before it either by ordering the production of the file on which Judge Johnson based his ruling or by directing Judge Johnson to order its production so that it could be made a part of the record below. There can be no question that an accused is entitled to have government files made a part of the record when such files contain evidence material to his case. **Jencks v. U. S.**, 353 U. S. 657, 77 S. Ct. 1007.

If the Court of Appeals did not have authority to use the direct method of ordering the file itself, it certainly had authority to direct the trial judge to do so under Rule 39 (a) of the Federal Rules of Criminal Procedure and under its own ruling in **Phillips Petroleum Corp. v. Williams**, 159 Fed. 2d 1011.

Assuming that it can properly be shown that Judge Johnson did investigate the alleged criminal acts of Pe-

titioner, there is no doubt that he should have disqualified himself. Yet the predicament in which Petitioner now finds himself is one of inability to show the facts which required disqualification and inability to obtain review of the trial judge's action based solely on the judge's own private knowledge of the facts. It hardly requires argument to show that a trial judge should not be the final arbiter of a question relating to his own disqualification. The Court of Appeals for the Fifth Circuit has held, in **Smith v. United States**, 238 F. 2d 925, 931:

> "... a defendant who, having first been presented with waivers to sign and having waived counsel and the benefit of consideration by a Grand Jury, is permitted by the Court to plead guilty instead of standing trial, is entitled to have the judge before whom he stands approached and act in the case with complete judicial detachment, uninfluenced by conferences in chambers with agents of the prosecution."

One who asserts his innocence is no less entitled to trial by an uninfluenced judge than one who pleads guilty.

With the foregoing authority, we are reduced to a question of the power of a District Judge to take judicial notice of matter which is not a part of any public record. We find no authority allowing him to do so. Furthermore, when such judicial notice is taken, there is no means by which an appellate court can review his ruling except by an inspection of the matter noticed.

We submit that the Court of Appeals for the Fifth Circuit was in error in denying Petitioner's motion to supplement the Record or remand for supplementation below. This is an unusual case and, so far as Petitioner has been able to ascertain, one of first impression in any court. Yet it deals with the right of every accused to have a fair and impartial trial before a judge who has no prior knowledge of or interest in his case.

The Decision of the Court of Appeals for the Fifth Circuit Is in Conflict With Decisions of the Supreme Court of the United States, the Supreme Court of Alabama, the Court of Appeals for the Eighth Circuit, the Court of Appeals for the Fourth Circuit, and the Court of Appeals for the District of Columbia, Relating to the Right of an Accused to Cross-Examine a Government Witness as to His Past Acts of Misconduct, When Such Acts of Misconduct Are Material Evidence.

Another fundamental question raised in this case is the right of one accused of a crime to prove that someone else did the act of which he is accused. Coupled with his right is the right to impeach the testimony of the persons that Petitioner claimed did the act. The testimony of Jack Hamel that he and his partner, Hayden McBrayer, engaged in the automobile transactions for the sole purpose of obtaining credit for Petitioner was directly in conflict with Petitioner's contention that Hamel and McBrayer bought and sold the automobiles. The testimony of Hamel that McBrayer and Hamel's good credit rating was responsible for their connection with the transaction certainly could be refuted with evidence that they did not have good credit rating. What better evidence could there be than a showing that McBrayer absconded from Montgomery with financed automobiles?

The evidence sought to be elicited from McBrayer was material not only in view of Hamel's testimony; it was also admissible to impeach the testimony of both Hamel and McBrayer. The decision of the Court of Appeals for the Fifth Circuit is in conflict with the decision of this court in **Tla-koo-yel-lee v. U. S.**, 167 U. S. 274, 17 S. Ct. 855. It is in conflict with the following decisions of Courts of Appeals of other circuits:

Pullman Co. v. Hall (4th C.), 55 F. 2d 139;
Weisflog v. U. S. (8th C.), 291 F. 2d 339;

Pittman v. U. S. (8th C.), 42 F. 2d 793;
Dist. of Col. v. Chessin (D. C.), 61 F. 2d 523.

It also conflicts with the decision of the Court of Appeals of Alabama in Moomaw v. State, 23 Ala. App. 125, 121 So. 904.

Petitioner admits that he was connected with the transactions in question to the extent of loaning money to McBrayer and Hamel for the purchase of automobiles. The testimony against him was primarily that of Jack Hamel, Hayden McBrayer, and Hollis Bryant (who had stolen the automobiles and delivered them to Montgomery). All of the other government witnesses stated facts consistent with Petitioner's contention. The weakness of the Government's connection of Petitioner with the alleged crimes is indicated by its statement in its Brief on Petition for Rehearing in the Court of Appeals that "Roberson was closely connected with the purchase and the sale of all three cars, whereas Hamel and McBrayer, at most, certainly had nothing to do with the Cadillac" (page 6).

In **Gordon v. United States**, 344 U. S. 414, 73 S. Ct. 369, this Court dealt with a criminal case where the Petitioners' "physical movements as recited by them were not materially different from those related by government witnesses, (but) petitioners gave a different and innocent version of the relationship of their acts to the criminal transactions" (73 S. Ct. 371). This Court stated that (73 S. Ct. 372): "Where, as here, the government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." While the **Gordon** case was decided on the basis of the trial judge's denial of a motion to produce the documents which would have affected the credibility of the witness, the real issue was the same as is presented here, i. e., the extent to which an accused may cross-examine one who testifies

against him but at the same time is closely linked with him in the alleged crime. To adhere to a rule which allowed an accused to be convicted on the testimony of those linked with him in the crime, without giving him the opportunity to fully cross-examine, would be an unthinkable miscarriage of justice, especially when the accused seeks to cross-examine such a witness about acts of that witness which are inconsistent with the witness' testimony.

In **Tla-koo-yel-lee v. United States**, supra, this Court reversed the district court of Alaska solely because the accused was not permitted to question a government witness concerning her cohabitation with the only other government witness. Both witnesses were closely linked to the crime. They were the only two witnesses against the accused. The witness whose examination was the subject of review was the wife of another man accused of the same offense but not presently on trial. It is apparent that the reason for the reversal by this Court was the witness' close connection with the alleged crime. The Court said at 17 S. Ct. 356:

> " . . . The whole occurrence at the time of the alleged murder is left in a good deal of confusion, and the credence to be given to the testimony of the woman was of the highest importance."

The government dismisses **Tla-koo-yel-lee** as an authority with the suggestion that the case was not "well litigated" (Brief, page 8). This is no answer. The facts in that case are directly analogous to those now before this Court. The accused was convicted on the testimony of persons who could clear themselves by testifying against him. A different problem would be presented if the District Judge had allowed Petitioner to examine McBrayer about his past misconduct but had limited the scope of such examination to avoid prolonging the trial by repetition. But such is not the case here. Judge Johnson did not limit,

but **refused**, the right of cross-examination on this vital matter; and he did so even though there was no objection from the Government. Not only was material evidence kept out of the case by the trial judge's ruling, but by his spontaneous ruling the judge gave added credence to McBrayer's testimony by holding him out to the jury as unassailable. Likewise, the judge discredited Petitioner's counsel before the jury by making it appear that he was attempting to improperly impeach McBrayer.

The Decision of the Court of Appeals for the Fifth Circuit Relating to the Prejudicial Effect of Remarks of a United States Attorney Raises an Important Federal Question Which Has Never Been Decided by This Court.

This case also raises the important question of the force and effect to be given by the Federal courts to State law. It is true that the question objected to did not specify whether the offense was a State or Federal offense (R. 225-226, 227). However, it is a general rule of evidence that when it is impossible to tell from the phrasing of a question whether or not the answer will be admissible the question is objectionable until a showing is made that the expected answer will be admissible. **Birmingham Ry. Light & Power Co. v. Selhorst**, 165 Ala. 475, 51 So. 568. Under the rule just stated, we must assume that the offense was a State offense, since no contrary showing was made by the Government. The offense was in fact a State offense.

The Court of Appeals held that the evidence sought as to Petitioner's prior conviction for distilling would have been admissible and stated: "The appellant has received a better break than that to which he was entitled" (R. 366). We think that the Court of Appeals was in error and that the question asked by the United States Attorney was so prejudicial, especially in view of the other questions presented here for review, as to require a mistrial.

On the first appeal of this case the Court of Appeals felt more strongly about such cross-examination. Petitioner's conviction was reversed because of improper cross-examination by the United States Attorney concerning Petitioner's previous conviction for violation of liquor laws. **Roberson v. United States**, 237 F. 2d 536. The Court said, at p. 541:

> "While Government counsel conducted the prosecution with commendable vigor, he allowed his zeal to cause him to disregard the precaution so well expressed by Judge Harlan, now Mr. Justice Harlan: 'We may also add ~~that~~ it is incumbent on prosecuting attorneys to be scrupulous in not stepping out of bounds on this sort of cross-examination.' United States v. H. Wool & Sons, 2nd Cir., 215 F. 2d 95, 99."

And further at p. 542:

> "Before we can afford entire verity to a verdict of guilty, that verdict must result from a trial fairly conducted **in every material respect** in accordance with the rules of law, and, inadvertently, this trial was not so conducted." (Emphasis added.)

If ever a case existed where prejudicial remarks by a prosecuting attorney could swing the balance in favor of conviction, then this is such a case.

Since we are dealing with a state offense, this Court must decide whether to allow the State which created the crime to prescribe the scope and effect of it, or whether we are to allow other courts, State or Federal, to give greater effect to the crime than is given to it by the State which punishes for it. The law of Alabama is clear to the effect that the crime **against the State of Alabama** of possessing a still or its product does not involve moral turpitude and is not a fit subject of inquiry for impeachment. The Court of Appeals of Alabama, in **Moore v. State**, 26 Ala. App. 607, 164 So. 761, said:

"The inquiry of witnesses touching their former convictions for the offense of violating the prohibition law in order to impair the weight of their testimony and reflect upon their credibility was improper, prejudicial and injurious. This line of inquiry should not have been attempted or indulged. . . .

". . . It has been repeatedly held that a violation of the prohibition laws of this state, both as to misdemeanors and felonies, does not in contemplation of law involve moral turpitude, hence is not a proper inquiry for the purpose of affecting the credibility of a witness."

This case states the general rule in Alabama. **Baugh v. State**, 215 Ala. 619, 112 So. 157; **Ex Parte Marshall**, 207 Ala. 566, 93 So. 471, 25 A. L. R. 338; **Cockrell v. State**, 32 Ala. App. 618, 29 So. 2d 152.

The acts which are criminal by Alabama law are not criminal under Federal law. Since the United States District Court for the Middle District of Alabama could not have initially punished Petitioner for this crime, it should not be allowed to penalize him beyond the conviction by admitting evidence of his conviction.

In **Fay v. United States**, 22 F. 2d 740, the Circuit Court of Appeals for the Ninth Circuit decided that it should not enlarge the scope of an Idaho statute prescribing the method of impeaching a witness for past convictions in a federal criminal case. Substantially the same situation is presented here. If such a question as was asked by the United States Attorney in this case were allowable, then the federal court would be giving to Alabama law an extra-territorial effect greater than that to which it is entitled in its own jurisdiction.

Even though the question here in issue was not answered, it was prejudicial enough to call for a mistrial.

And the United States Attorney was not content to ask the question only once—he asked it twice. We submit that it is particularly important in a case such as this, with conflicting testimony and with almost all of the testimony against the accused being given by those who would probably benefit from his conviction, that the trial be absolutely free of prejudicial statements or questions by anyone.

CONCLUSION.

For the foregoing reasons Petitioner submits that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Certificate.

I, Truman M. Hobbs, one of the attorneys for Herman Roberson, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of ....., 1958, I served copies of the foregoing Petition for Certiorari on the several parties thereto as follows:

1. On Hartwell Davis, Esquire, U. S. Attorney for the Middle District of Alabama, by depositing same in the United States mail, first class postage prepaid, addressed to him at his offices, U. S. Government Building, Montgomery, Alabama.

2. On William L. Longshore, Esquire, U. S. Attorney for the Northern District of Alabama, by depositing same in the United States mail, first class postage prepaid, addressed to him at his offices, Federal Building, Birmingham, Alabama.

3. On the Solicitor General, Department of Justice, Washington 25, D. C., by depositing same in the United States mail, air mail postage prepaid, addressed to him at the foregoing address.

Truman M. Hobbs,
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Attorney for Petitioner.

APPENDIX "A."

Opinion.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 16,626.

Herman Roberson,
Appellant,

versus

United States of America,
Appellee.

Appeal from the United States District Court for the Middle District of Alabama.

(November 22, 1957.)

Before Rives, Jones and Brown, Circuit Judges.

Jones, Circuit Judge: The appellant, Herman Roberson, was charged under the Dyer Act, 18 U. S. C. A., § 2313, in four counts of an indictment with receiving stolen motor vehicles which were moving in interstate commerce, and in a fifth count with having sold one of the cars. He was convicted on three of the counts for receiving stolen cars and on the count for selling. The conviction was reversed for a new trial. **Roberson v. United States**, 5th Cir., 1956, 237 F. 2d 536. On a second trial Roberson was convicted on two of the counts for receiving stolen cars and on the

count for selling. We now review on appeal this conviction.

On the appeal from the first conviction, one of the assignments of error was based upon the denial by the trial court of a motion for a bill of particulars. It was held that this did not constitute reversible error for two reasons; first, that the motion was filed on the day of the trial rather than ten days after arraignment as required by Rule 7 (f), Fed. Rules Crim. Proc., 18 U. S. C. A.; and second, because the United States had furnished counsel for Roberson with the motor numbers of the automobiles involved. 237 F. 2d 536, 538. After the mandate of this Court went down and on March 1, 1957, about four weeks before the second trial, the appellant filed an amended motion for a bill of particulars seeking more descriptive identification of the vehicles involved than was set forth in the indictment. The motion was denied and in its order denying the motion the district court held that the furnishing of the motor numbers was sufficient and that the identification of the cars was amply established in the evidence at the former trial, of which a transcript was available to appellant. The purpose of a bill of particulars is to enable a defendant to prepare for trial and to bar subsequent prosecution. **Norris v. United States**, 5th Cir., 1946, 152 F. 2d 808, cert. den. 328 U. S. 850, 66 S. Ct. 1118, 90 L. Ed. 1123. The granting or denial of a bill of particulars rests in the sound discretion of the trial court, and in the absence of abuse of discretion or prejudice, its ruling will not be disturbed. **Wong Tai v. United States**, 273 U. S. 77, 47 S. Ct. 300, 71 L. Ed. 545; **Reynolds v. United States**, 5th Cir., 1955, 225 F. 2d 123, cert. den. 350 U. S. 914, 76 S. Ct. 197, 100 L. Ed. 801, reh. den. 350 U. S. 929, 76 S. Ct. 301, 100 L. Ed. 812; **Johnson v. United States**, 5th Cir., 1953, 207 F. 2d 314, cert. den. 317 U. S. 938, 74 S. Ct. 632, 98 L. Ed. 1087. Roberson was not surprised. He knew the description of the cars he was charged with receiving and the car he was accused of selling. He was

not in a..y way prejudiced by the trial court's order and its discretion was not abused.

One of the jurors was a friend of some years standing of the United States Attorney prosecuting in the trial. The friendship, though long enduring, was not close nor intimate and their contacts in recent years had been infrequent and casual. It was known to counsel for the appellant, prior to the time the jury was accepted, that the juror and the prosecutor were acquainted but the extent and duration of their acquaintance was not known to him nor was it developed on voir dire. During a recess of the court, the juror and the United States Attorney met in the rest room. The juror asked the prosecutor if the jury could go home that night if the case was not finished. The prosecutor said they could, and went on to say that although he could answer such a question as was asked, he could not discuss the case. The trial court declined to declare a mistrial or grant a new trial and this refusal is assigned as error. A juror is not per se disqualified because he is acquainted with or a friend of counsel in a case, whether advocating the cause of a private litigant or prosecuting in a criminal trial. See 31 Am. Jur. 658 et seq., Jury, § 133. No prejudice of the juror was shown at or before the jury was sworn or at any time thereafter. The conversation between the district attorney and the juror was casual, it was in no way related to the issues of the case, no prejudice was shown and it was explained to the trial court. Its discretion was not abused in declining to grant a mistrial and in refusing to grant a new trial.

The appellant took the stand on his own behalf. While being cross-examined by Government counsel, he was asked, "Now, in 1941, on the 28th day of April, were you convicted of distilling and did you receive a sentence of three years?" Objection was made and sustained and the jury was instructed to not consider it. A motion for a

mistrial was made and overruled. Later, Government counsel started a question with, "Now, I will ask you this question: On April 28, 1941, were you convicted of—" when he was interrupted by the court. The question was never completed. The court thought that counsel had not gone far enough with the question to require an instruction that it be disregarded. In support of his claim of prejudicial error, the appellant cites Alabama cases holding that a witness cannot be impeached by showing the conviction of a crime which does not involve moral turpitude and that violating prohibition laws is not an offense that does involve moral turpitude. Under the law of Alabama illegal manufacture of intoxicating liquor is punished by a penitentiary sentence of from one to five years. 29 Ala. Code 1940, § 103. In Alabama an offense that may be punished by imprisonment in the penitentiary is a felony. 1 Ala. Code 1940, § 7. Under the Federal law any offense punishable by imprisonment for more than a year is a felony. 18 U. S. C. A., § 1 (1). The Alabama rule upon which the appellant relies is not applicable. In a recent opinion this court said:

> "Congress has not given the states the power of prescribing the rules of evidence in trials for offenses against the United States. In criminal cases in the federal courts, the admissibility of evidence and the competency and the privileges of witnesses are governed, except when an act of Congress or the Federal Rules of Criminal Procedure otherwise provide, by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. Rule 26, Federal Rules of Criminal Procedure; On Lee v. United States, 343 U. S. 747, 754, 755, 72 S. Ct. 967; McNabb v. United States, 318 U. S. 332, 341, 63 S. Ct. 608, 87 L. Ed. 819; Olmstead v. United States, 277 U. S. 438, 468, 469, 48 S. Ct. 564, 72 L. Ed. 944." **Pollock v. United States,** 5th Cir. 1953, 202 F. 2d 281, 285.

See Holtzoff, Reform of Federal Criminal Procedure, 3 F. R. D. 445, 452, et seq. For the purpose of discrediting a witness in a Federal criminal trial it is not improper to show that the witness, including a defendant who has elected to testify, has been convicted of a felony or of a misdemeanor involving moral turpitude. See **Pearson v. United States**, 6th Cir. 1951, 192 F. 2d 681, 699. Cf. **Steele v. United States**, 5th Cir. 1957, 243 F. 2d 712. There was, it seems, some question before the adoption of the Twenty-first Amendment as to whether violations of the prohibition acts involved moral turpitude. See annotations 40 A. L. R. 1049, 71 A. L. R. 219. Since repeal, conducting a business of making, transporting or selling shine and defrauding the Government of taxes is a Federal offense involving moral turpitude. **Jordan v. De George**, 341 U. S. 223, 71 S. Ct. 703, 95 L. Ed. 886, reh. den. 341 U. S. 956, 71 S. Ct. 1001, 95 L. Ed. 1377. The unanswered question did not say whether the query contemplated a Federal or State offense. If the latter it might be one which did not involve moral turpitude, but in any event it would have been a felony. There was no error in the question. There would have been no error had the appellant been required to answer it. The appellant has received a better break than that to which he was entitled.

Among the grounds for a new trial, rejected by the trial court, the appellant urged that the district judge was disqualified and this was unknown to appellant during the trial. One of the witnesses for the Government, Hollis Bryant, had been convicted in the Northern District of Alabama of some offense involving the interstate transportation of stolen motor vehicles, and the district judge who presided at the trial of the case before us was the United States Attorney who prosecuted Bryant in the Northern District of Alabama. This is the asserted basis for disqualification. A judge should disqualify himself in any case where he has been of counsel. 28 U. S. C. A.,

§ 455. A United States attorney is of counsel for the Government in criminal prosecutions. **United States v. Vasilick,** 3rd Cir. 1947, 160 F. 2d 631; **United States v. Maher,** D. C. Me. 1950, 88 F. Supp. 1007. The case before us was not against Bryant so it does not appear that the letter of the statute would be applicable. But if the cars involved in the trial over which the former United States attorney presided as district judge were the same as those involved in the investigation made and prosecution conducted by him as counsel for the Government, there might have been presented a situation under which the judge should have disqualified himself. A prior knowledge of the facts or a prior interest in an issue arising out of them may be a ground for disqualification. It is not shown that the cars were the same in this case as in the case against Bryant. The contrary is asserted and the statement of the trial judge that the ground is frivolous seems to bear out the assertion. Certainly the record does not disclose nor does the appellant show any prejudice. The ground is without merit.

One of the Government witnesses, Hayden McBrayer, had formerly been a partner in the operation of a used car business. He testified as to some transactions of or with the appellant and Bryant. Portions of his testimony related to the vehicles involved in the case. On cross-examination the witness was asked by counsel for the appellant, "Did you leave Montgomery with the floor planned automobiles that Mr. Barnett had floor plans on?" The court interrupted and declined to permit the witness to answer. Counsel then urged that the question was for impeachment. The court held the question sought to bring in immaterial matter which was not pertinent to the case. Counsel for the appellant now urges that the purpose of the inquiry was to show that the witness and his partner were not fine business men with excellent credit. If the question was intended to elicit testimony for

impeachment it was improper. Although, as has been said, the conviction of a witness of a felony can be shown to impeach his credibility, it does not follow that an attempt may be made to impeach a witness by showing wrongful conduct or the commission of an offense for which there has been no conviction. **Lennon v. U. S.**, 8th Cir. 1927, 20 F. 2d 490; **Echert v. United States**, 8th Cir. 1951, 188 F. 2d 336, 26 A. L. R. 2d 752. If the question was asked to show the financial condition of the firm of which the witness was member no error was committed in declining to allow it. The question was collateral to the purpose for which appellant's counsel says it was asked and quite remote from the issue of the guilt of the appellant of the offense with which he was charged. The scope of cross-examination and the limits upon it must of necessity be committed to the discretion of the trial court and in the absence of abuse that discretion will not be interfered with. See **Alderman v. United States**, 5th Cir. 1929, 31 F. 2d 499. This is particularly true as to collateral or irrelevant matters. **Marteney v. United States**, 10th Cir. 1954, 218 F. 2d 258, cert. den. 348 U. S. 953, 75 S. Ct. 442, 99 L. Ed. 745; **Dolan v. United States**, 8th Cir. 1955, 218 F. 2d 454; 3 Wharton's Crim. Evid. 12th Ed. 258, § 867.

In terminating the colloquy with counsel with respect to the cross-examination of the witness McBrayer, the court said, "I told you I would not allow you to go into that, it is not pertinent in my judgment. I don't want to hear any more examination on it during the course of this trial for the Government or the defendant." This statement, appellant urges, was a reprimand of his counsel, and so bolstered the Government's witnesses as to assure the conviction of the defendant from that point. We do not think the observation of the court permits the inference which appellant would have us draw from it. We find nothing prejudicial to the defendant in the statement.

The witness Hollis Bryant, replying to a question of the district attorney, answered that he did not recall. The district attorney was permitted to ask leading questions for the purpose of refreshing the recollection of the witness. These questions were with respect to statements made by him to the appellant or by the appellant to him and were based on a transcript of the testimony of the witness at the previous trial. There were three such questions. In response to two of them the witness said he did not recall and in answering the other he said he could have made the statement about which he was asked. Nothing was drawn from the lips of the witness by these questions which would have resulted in prejudice to the defendant if error had been committed. But we see no impropriety in the court's action. The trial court may in its discretion, permit leading questions to refresh the recollection of a witness. The manner of exercise of this discretion will not be ground for reversal unless the discretion be abused. 3 Wharton's Crim. Evid. 222, § 847. Prior testimony may, in the discretion of the trial court, be used for the purpose of refreshing the recollection of witnesses. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150, 60 S. Ct. 811, 84 L. Ed. 1129; Wigmore on Evidence, Vol. III, pp. 105 et seq., § 761.

The court charged the jury that "possession of a stolen automobile, may, under proper circumstances be sufficient for you to draw on inference of guilty knowledge on the part of the defendant that the automobile, or automobiles, were stolen". The appellant did not except to the charge. He did not request any instruction defining "possession". He now urges that the failure of the trial court to include in its charge a definition of "possession" is a plain error or defect affecting the appellant's substantial rights which this Court should notice under Rule 52 (b), Fed. Rules Crim. Proc., 18 U. S. C. A., although not brought to the attention of the trial court. In support of this contention

we are cited **Barfield v. United States**, 5th Cir. 1956, 229 F. 2d 936, as controlling authority. A judicial opinion, as a precedent, is to be read and applied in the light of the facts of the case in which the opinion was written. Among the recent cases stating this doctrine are **White v. Aronson**, 302 U. S. 16, 58 S. Ct. 95, 82 L. Ed. 20; and **Armour & Co. v. Wantock**, 323 U. S. 126, 65 S. Ct. 165, 89 L. Ed. 118. In the Barfield case the appellant claimed to be a hitchhiker. He was driving a stolen car which was involved in a wreck. He claimed he was picked up by a person, pointed out by him at the scene of the wreck, who was believed by him, so he said, to be the owner of the car. In the Barfield case, as the opinion there shows, in the setting which that case portrayed and under the circumstances of that record, a definition of possession should have been given to the jury in connection with the charge, in substance, that possession of recently stolen property raises a presumption of guilty knowledge. Such a factual situation is not here portrayed nor do the circumstances of this record call for the application of the rule there adopted. There was ample evidence in this case which, if believed as the verdict shows it was, sustains the conclusion that the appellant had the custody and control of the cars in question. Custody and control are the commonly accepted and generally understood incidents of possession. No peculiar condition requiring that "possession" be defined was here present.

The appellant takes exception to the refusal of the trial court to give the jury the charges requested by him. The court refused to give the charges because they were covered by the oral charge or did not state correct propositions of law, and on the further ground that copies were not furnished to the district attorney as required by Rule 30, Fed. Rules Crim. Proc., 18 U. S. C. A. The appellant seeks to excuse compliance with the rule by saying that the tendered instructions were the same as those offered

at the former trial and hence no need existed for submitting them again. Because, appellant argues, he was denied a bill of particulars on the ground, among others, that the cars involved were the same as in the former trial, so should there be no necessity of furnishing other counsel with requested instructions since they were the same as before. This argument, though plausible in sound becomes fallacious upon examination. The identity of the cars was of necessity the same in both trials. The identity of the offered instructions was not necessarily the same and the district attorney should not be expected to assume that they would be nor to search for copies of them. In any event we have examined the tendered instructions and agree with the trial court that they are incorrect, inapplicable or adequately covered by the instructions given.

Errors are assigned by reason of the trial court's refusal to direct an acquittal, to grant a motion in arrest of judgment and in overruling a motion for new trial. These are based upon the other assignments of error which we have discussed or upon the sufficiency of the evidence. We have examined the record. As on the former appeal and for the same reasons as in the former opinion, 237 F. 2d 536, 538, we hold that the motion for judgment of acquittal was properly denied. So also as to the motion in arrest of judgment and the motion for a new trial. Extension of this opinion for a discussion of the evidence would serve no useful purpose. The judgment of the district court is

Affirmed.

A true copy.

Attest:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

(Seal)

APPENDIX "B."

Judgment.

Extract From the Minutes of November 22, 1957.

Herman Roberson

No. 16626. versus

United States of America.

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.